



Kenwood Property Developers Limited v Munyambu & another (Miscellaneous Civil Application E413 of 2023) [2024] KEHC 4216 (KLR) (Commercial and Tax) (30 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4216 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E413 OF 2023**

A MABEYA, J

APRIL 30, 2024

BETWEEN

KENWOOD PROPERTY DEVELOPERS LIMITED APPLICANT

AND

ONESMUS NGIGE MUNYAMBU 1ST RESPONDENT

GRACE WANJIKU NGIGE 2ND RESPONDENT

RULING

1. The application before Court is dated 19/5/2023. It was brought under Section 17 of the *Arbitration Act* and Article 159 of the *Constitution*.
2. The pending prayers sought a finding that the arbitrator lacks jurisdiction to hear and determine the dispute between the parties relating to the agreement dated 2/3/2011 as the same was already heard and determined in Thika Environment and Land Court at Thika ELC Case Number 15 of 2017.
3. The grounds for the application were set out on the face of the Motion and in the affidavits of Caroline Muchendu sworn on 19/5/2023 and 31/7/2023, respectively. It was contended that judgment was delivered in Thika ELC Case No. 15 of 2017 (“the Thika ELC matter”) on 18/7/2020 wherein the court adjudicated upon the parties’ rival claims over Villa No. 1 situated at Kenwood Villas Thika.
4. That the said judgment was not appealed or reviewed. That in that judgment, the court found that there was no dispute that could be referred to arbitration while there was another dispute involving the same parties in court.
5. That the 1st respondent had filed his own case against the applicant and the same was consolidated in the Thika ELC matter which had a conclusive judgment. That the 1st respondent also testified on behalf of the claim by the 2nd respondent wherein he sought a declaration that the villa belonged to



him and sought for a partial discharge over the subject villa. That the issue of whether or not the matter should have gone to arbitration was also determined.

6. That despite the judgment being in place, the applicant filed the claim before the arbitrator seeking refund of Kshs. 26,300,000/= which had not initially been sought in the Thika ELC case when the respondents sought a declaration of ownership of the subject villa.
7. That the applicant herein lodged before the tribunal an application dated 23/2/2023 challenging the jurisdiction of the arbitrator. The arbitrator dismissed the same on 22/4/2023 on the ground that the Judge in the Thika ELC Case had not exercised her judicial mind on the matter. He therefore held that he had jurisdiction to hear and determine the matter.
8. It was contended that the ruling of the tribunal amounted to an appeal on the judgment delivered in Thika ELC and without jurisdiction, the arbitrator's eventual award would be a nullity and the proceedings were an unnecessary expense to the parties.
9. The 2nd respondent opposed the application vide her replying affidavit sworn on 14/7/2023. She averred that she and the applicant entered into an agreement for purchase of the subject villa for Kshs. 27,000,000/= out of which she paid Kshs. 26,300,000/=. That she later found that the applicant had charged the entire property to Family Bank.
10. That the applicant moved to court to stop the sale of the villas and the 1st respondent made an application to be enjoined as an interested party in the suit. That in the judgment, the court noted that Family Bank was not a party to the lease agreement and had no locus standi to contend on how the Lease was to be effected.
11. That the court also noted that the 1st respondent did not have a dispute with the applicant at the time of getting enjoined in the suit. That arbitration could not have been instituted during the pendency of the suit whose purpose was to save the villas from sale and thereafter the applicant was to perform the terms of the lease agreement. That the applicant failed to perform those terms by failing to grant possession of the villa on the completion date and this led to the filing of the arbitral claim.
12. She therefore averred that the dispute in the Thika ELC Case was different from that in the arbitration and res judicata was not applicable. That the arbitrator's ruling on jurisdiction was well reasoned and the instant application was another delay tactic to deny the respondent either possession of the villa or refund of the 97% purchase price paid to the applicant.
13. The applicant filed two sets of submissions dated 18/9/2023 and 1/12/2023 whereas those of the 2nd respondent were dated 10/11/2023.
14. I have considered those submissions alongside the pleadings and evidence before Court. The main issue for determination is whether the arbitrator has jurisdiction to hear and determine the dispute between the parties herein.
15. Section 17 of the *Arbitration Act* provides that an arbitral tribunal has competence to rule on its own jurisdiction. Section 17(6) thereof provides for recourse to the High Court should a party be aggrieved by the decision of an arbitrator and provides as follows: -

“(6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.



(7) The decision of the High Court shall be final and shall not be subject to appeal.”

16. The present application is challenging the jurisdiction of the arbitrator on the ground of ‘*res judicata*’ based on the judgment in Thika ELC Case. The applicant’s case is that there is a judgment in place delivered in Thika ELC No. 15 of 2017 which conclusively determined the rights of the parties as regard the subject lease agreement dated 2/2/2015 for the sale of Villa No. 1, and further determined the issue whether the dispute could be referred to arbitration.
17. On the other hand, the respondents contend that during the pendency of the suit, the matter could not be referred to arbitration but upon conclusion and delivery of judgment, the applicant still failed to perform its obligation under the lease and the matter was therefore referred to arbitration. It was also contended that the dispute before the ELC court was distinct with that before the arbitral tribunal.
18. In his ruling dated 22/4/2023, the arbitrator found that the parties before the tribunal were not the same as those in the Thika suit, the former suit was not pending, the matter in the arbitration was not substantially similar to that in the Thika suit, the matter before the tribunal was not heard and determined on, the court never exercised its judicial mind to the contested matter before the tribunal, and that in the circumstances, no decision was made on the merits of the case between the parties that were before him.
19. I have seen the judgment in the Thika ELC Case. The suit was between the applicant herein as the plaintiff and Family Bank Limited as the defendant. The orders sought therein related to the bank’s attempt to auction the suit property (LR No. 8361/30) subject to an existing charge on it. It also sought a declaration that the interest and penalty charged were unconscionable, a permanent injunction restraining the defendant from disposing the property, an order directing the defendant to render the plaintiff’s full account and an order directing that the property be valued.
20. The respondents joined the suit as interested parties after their suit, Thika ELC No. 74 of 2017 was consolidated with No. 15 of 2017 vide ruling dated 14/5/2020. They sought an injunction to restrain the applicant from selling Villa Nos. 1 and 6 which they had purchased from the applicant, and an order directing the applicant to complete the construction of the villas as per the lease agreements.
21. In its judgment of 18/6/2020, the court allowed the prayer for a permanent injunction having found that the notices were not duly served and also granted the prayer for valuation of the property.
22. As regards the respondent’s claims, the court addressed itself to the issue of arbitration and found that the issue of referral to arbitration was raised by the Family Bank which was not a party to the Lease Agreement and therefore lacked locus standi to contend on how that agreement was to be effected.
23. The court also found that the respondents herein had admitted that they had no dispute with the applicant and that their dispute only arose because the villas were at risk of being sold by a third party, the bank, who was not a party to the Lease Agreement.
24. The court thus found that the dispute could not be referred to arbitration with the pendency of the suit which involved the same properties as there would be a risk of conflicting decisions. The court also found that the partial discharge sought could not be granted until the respondents herein fully paid the purchase price.
25. I have also considered the claim before the arbitral tribunal. In that forum, the respondents herein have sought a refund of Kshs. 26,300,000/= from the applicant together with 15% interest on grounds that the applicant breached the lease agreement as it had failed to deliver vacant possession of the villa, failed



to procure completion of the transaction, registered a charge against the villa without consent among other grounds.

26. Did those two suits sufficiently meet the ground for res judicata? The doctrine of res judicata is set out in the *Civil Procedure Act* at Section 7 whose provision is clear.
27. In *Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board & another; Kinyanjui Njuguna & Company Advocates & another (Interested Parties)* [2020] eKLR, it was held: -
- “ A close reading of Section 7 of the Act reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine’s five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:
- i. The suit or issue raised was directly and substantially in issue in the former suit.
 - ii. That the former suit was between the same party or parties under whom they or any of them claim.
 - iii. That those parties were litigating under the same title.
 - iv. That the issue in question was heard and finally determined in the former suit.
 - v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.”
28. From the face of it, it is quite evident that the grounds for res judicata were not met in the claim before the arbitral tribunal so as to oust its jurisdiction to hear and determine the dispute between the parties.
29. The issues and orders sought in Thika ELC No. 15 of 2017 as consolidated were so evidently distinct from those sought before the tribunal. The true parties in the Thika suit were the applicant herein and Family Bank. The issues related to the bank’s attempt to auction the suit property therein, being LR No. 8361/30.
30. The issue of the breach or otherwise of the Lease Agreement between the applicant and the respondents never arose and could not be raised as no breach had arisen. Clearly, that court could not venture to determine an issue that was neither before it nor was not contemplated. I therefore agree with the decision arrived by the arbitrator.
31. In this regard, it is very clear that the issue of jurisdiction being raised before the tribunal was but a red herring meant to distract the tribunal from dealing with the matter before it. The court in the Thika ELC Case did not and could not determine the issue of breach of contract nor the issue of refund of the purchase price. The tribunal therefore correctly found that the dispute before the tribunal had not been heard and determined with finality.
32. In the circumstances, it is this court’s finding that the arbitrator’s ruling on jurisdiction was sound having found that the claim before the tribunal was not res judicata.
33. In the premises, I find that the application dated 19/5/2023 to be without merit and dismiss the same with costs to the 2nd respondent. The orders staying the arbitral proceedings are hereby set aside.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL, 2024.

A. MABEYA, FCI Arb



JUDGE

